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No. 94-684

In The

Supreme Court of the United States

October Term, 1994

AIRBUS INDUSTRIE, ET AL.,

Petitioners,

v.

LAURA HOWELL LINTON, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

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I. The Court Should Grant the Petition to Resolve Whether Section 1447(d) Applies to Deprive Foreign Sovereigns of the Right to Seek Review Under the Collateral Order Doctrine of an Erroneous Denial of Immunity from Suit Under the FSIA When the District Court Remands the Case to State Court.

The Respondents accuse the Petitioners of having mischaracterized the nature of the question presented by having suggested "that the district court below issued a separable order 'denying a party's claim of immunity from suit under the [FSIA].' " Br. in Opp. at 5 (quoting Pet. at i). The Respondents contend that the district court at no time denied the Airbus Defendants' claim to immunity from suit under the FSIA. They base this contention on the faulty premise that the FSIA Order determined only whether the district court had removal jurisdiction under the FSIA and not whether the Airbus Defendants were entitled to immunity from suit under the FSIA. Br. in Opp. at 3, 5, 9. The district court's own opinion and stay order belie such an argument.

In its order remanding the case to state court, the district court expressly recognized the separable nature of its substantive FSIA ruling when it distinguished between its order of remand, which it described as nonappealable, and its FSIA ruling, which it described as appealable: "As the Court understands it, an order remanding a case for lack of subject matter jurisdiction is not reviewable on appeal. However, Defendants are entitled to appeal the Court's previous ruling that they are not foreign sovereigns as defined by the Foreign Sovereign Immunities Act ('FSIA')." Appendix B at B-11 n.12. Moreover, the FSIA Order was issued long before the order of remand. When announcing its decision that the FSIA did not apply to the Airbus Defendants, before the first appeal and long before the order of remand was entered, the district court expressed its view that the FSIA Order was final and appealable under the collateral order doctrine. Transcript of July 14, 1992 Hearing at 5 ("Simply put, that's an automatically appealable issue."). Thus, the argument that the FSIA Order applied only to the jurisdictional decision, given the facts of this case, is logically impossible.

Apart from the district court's view of its own actions, under the doctrine of merger, all nonfinal rulings, such as the FSIA Order denying the Airbus Defendants' FSIA status, become final when an order is entered terminating the federal proceeding. *E.g.*, *Akin v. PAFEC Ltd.*, 991 F.2d 1550, 1563 (11th Cir. 1993); *Dickinson v. Auto Center Mfg. Co.*, 733 F.2d 1092, 1102 (5th Cir. 1983). The district court's FSIA Order, by operation of the doctrine of merger, has now become a final order denying the Airbus Defendants' FSIA immunity.

Respondents also argue that once the district court determined that it had no subject matter jurisdiction, it had no authority to rule on the Airbus Defendants' substantive FSIA immunity defenses. Br. in Opp. at 9. In this case, however, the district court's holding that the Airbus Defendants were not entitled to FSIA status controlled the resolution of both the motion to remand and the motion to dismiss. Once the district court determined that the Defendants did not qualify for FSIA status, it necessarily and simultaneously determined that the Defendants did not qualify for FSIA removal (the remand motion) and FSIA immunity (the motion to dismiss). Accordingly, the proposition that the district court cannot make additional rulings after it determines that it has no jurisdiction has no application in this case. *See In re Life Ins. Co. of N. Am.*, 857 F.2d 1190, 1192-93 (8th Cir. 1988).

II. The Court Should Grant the Petition to Resolve the Split in the Circuits Concerning the Application of the Separable Order Doctrine.

Although none of the cases cited in the Petition as conflicting with the Fifth Circuit's decision involved FSIA removal, there is a direct, real, and intolerable conflict among the circuits on the application of the separable order doctrine. The separable order doctrine followed in the Third, Ninth, and Sixth Circuits is much broader than the doctrine followed in the Fifth Circuit, and the result would have been different in these other circuits.

A. The *City of Waco* Exception Applies Since the Remand Order Is Conclusive.

The Respondents argue that the exception first announced in *City of Waco v. United States Fidelity & Guar. Co.*, 293 U.S. 140 (1934), does not apply in this case because "there was no dismissed claim nor any order which 'in logic and in fact' was 'separable' from the district court's jurisdictional determinations regarding remand." Br. in Opp. at 9. Respondents also argue that the *City of Waco* exception does not apply because the district court's FSIA findings were jurisdictional and thus had no preclusive effect on the Airbus Defendants in this case. Respondents' reliance on these arguments is misplaced.

First, application of the separable order doctrine, which developed from this Court's *City of Waco* decision, does not require that a claim have been dismissed. Respondents cite no authority for that proposition, nor did they take that position before the Fifth Circuit in this case.

Second, as explained in the Petition, Pet. at 14-22, the district court's denial of FSIA immunity was "in logic and in fact" separable from the district court's jurisdictional determination.

Third, as explained in the Petition, the district court's remand order conclusively determined the Airbus Defendants' right to have the case dismissed for *forum non conveniens* since that defense cannot be asserted in Texas state court.[1] *See* Pet. at 13 & n.4, 16 & n.5. The remand order also conclusively determined the Airbus Defendants' right to a federal forum under 28 U.S.C. § 1441(d) and the FSIA, as well as the issue of removability itself. *See* Pet. at 13 & n.4, 16 & n.5. As the Third Circuit explained in *In re TMI Litigation Cases Consolidated II*, 940 F.2d 832 (3d Cir. 1991), *cert. denied*, 112 S. Ct. 1262 (1992), the proper inquiry in determining whether a remand order is conclusive is whether the issue of removability is unreviewable on remand. Like *TMI*, the district court's refusal

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[1] The district court's remand order stated that if the court had not remanded the case to state court, it would have dismissed the case for *forum non conveniens*. Appendix B at B-11 n.12.

to assume jurisdiction conclusively determined the issue of removability. *Id.* Respondents make no attempt to respond to these arguments and instead merely focus on whether the Airbus Defendants can reurge their immunity claim in state court. Br. in Opp. at 10.

B. There Is No Legitimate Distinction Between *TMI* and This Case.

Respondents argue that the *TMI* case does not apply here because there is no finding of unconstitutionality. Br. in Opp. at 10-11. This is a distinction without a difference. Respondents make no attempt to explain why the unreviewability of findings of unconstitutionality – the factor that animated the Third Circuit's decision in *TMI* – is any less compelling or important than the unreviewability of erroneous interpretations of the FSIA. A determination that the FSIA does not apply to a foreign sovereign claiming FSIA immunity is no less important than a determination that a statute is unconstitutional.[2] As this Court has recognized, Congress' intent in providing foreign sovereigns an absolute right to remove actions against them was clear: "Congress deliberately sought to channel cases against foreign sovereigns away from the state courts and into federal courts, thereby reducing the potential for a multiplicity of conflicting results among the courts of the 50 States." *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 497 (1983). Indeed, given that a denial of a claim of immunity from suit is immediately appealable under the collateral order doctrine and that a determination of unconstitutionality is not immediately appealable, this case presents a more compelling reason to allow review as a separable order than did *TMI*.

Respondents attempt to show that the result would not have been different in this case in the Third Circuit by arguing that if the issue can be raised in state court on remand, the exception to section 1447(d)'s bar to review does not apply in the Third Circuit. *See* Br. in Opp. at 10 n.5 (citing *Carr v.*

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[2] For a full discussion of the importance of the FSIA, see subpart I(C) of the Petition.

American Red Cross, 17 F.3d 671, 675 (3d Cir. 1994)). Although in the Third Circuit's *Carr* decision whether the Red Cross was properly a party to the suit may have been conclusively determined by the district court's dismissal of the Red Cross and its remand to state court, the same cannot be said of the unconstitutionality finding in the Third Circuit's *TMI* decision – nothing precludes parties from reurging constitutionality issues in state court on remand. *See, e.g., Carlisle v. Phillip Morris, Inc.*, 805 S.W.2d 498, 505 (Tex. App. – Austin 1991, writ denied) (Texas state courts are not bound by lower federal courts' interpretation of the federal constitution or federal statutes); 1B JAMES W. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 0.404[1], at II-3 (1993) (law of the case typically applies to rulings by a superior court that bind an inferior court, *e.g.*, on remand from an appeal; interlocutory rulings of a federal trial court in cases remanded from state to federal court are not binding – the law of the cases doctrine is discretionary, a practical issue of case management).

C. The Result Would Have Been Different Under the Test Articulated by the Sixth and Ninth Circuits.

The Respondents argue that the Fifth Circuit's decision in this case does not conflict with the Ninth Circuit's decisions in *Clorox Co. v. United States District Court*, 779 F.2d 517, 520 (9th Cir. 1985), and *Pelleport Investors, Inc. v. Budco Quality Theatres, Inc.*, 741 F.2d 273, 276-77 (9th Cir. 1984), or with the Sixth Circuit's decision in *Regis Associates v. Rank Hotels (Management) Ltd.*, 894 F.2d 193, 194 (6th Cir. 1990). While both *Pelleport* and *Regis* involved forum selection clauses, under the separable order doctrine articulated by those decisions, review would not have been barred in this case. For example, in *Regis*, the court stated that "a remand order is reviewable on appeal when it is based on a substantive decision on the merits of a collateral issue as opposed to just matters of jurisdiction." *Regis*, 894 F.2d at 194. Under this test, the remand order in this case was "based on a substantive decision on the merits of a collateral issue" – whether the Airbus Defendants were foreign sovereigns under the FSIA and thus

entitled to immunity from suit – "as opposed to just matters of jurisdiction." *Id.*

Likewise, in *Pelleport*, the Ninth Circuit based its conclusion that section 1447(d) did not preclude review on its finding that the remand order was based on a substantive determination affecting the rights of the parties. *Pelleport*, 741 F.2d at 277. Similarly, while in *Clorox* the remand order was based on the district court's belief that Clorox had waived its right to remove, the Ninth Circuit's holding that section 1447(d) did not bar review was based on its conclusion that a determination of waiver of the right to remove was a substantive decision on the merits apart from any jurisdictional decision. *Clorox*, 779 F.2d at 520.

III. The Fifth Circuit's Rule Has Already Produced the Anomalous Results That the FSIA Was Intended to Avoid.

In the Petition, the Airbus Defendants pointed out the bizarre results created by the Fifth Circuit's refusal to review underlying FSIA determinations when a case has been remanded to state court. Pet. at 23-24. In the first example, the Airbus Defendants pointed out that it is now the law that the Insurance Company of Ireland ("ICI"), the party claiming to be an agency or instrumentality of a foreign state in *Mobil Corp. v. Abeille General Insurance Co.*, 984 F.2d 664, 666 (5th Cir. 1993), is *at the same time* a foreign state in the Third Circuit and entitled to a federal forum, *In re Texas E. Transmission Corp. PCB Contamination Ins. Coverage Litig.*, 15 F.3d 1230, 1238 n.8 (3d Cir.), *cert. denied*, 115 S. Ct. 291 (1994), but it is not a foreign state in the Southern District of Texas in the Fifth Circuit, *Mobil Corp.*, 984 F.2d at 666. *See* Pet. at 23-24.

The Respondents accuse the Airbus Defendants of having "fail[ed] to point out that in [*Texas Eastern*], ICI had been taken over by the Irish government while in [*Mobil*], ICI's acts occurred while it was still a private entity." Br. in Opp. at 13. Respondents are mistaken about the facts of the *Texas Eastern* case. In *Texas Eastern*, ICI was a private entity when the act occurred. *Texas Eastern*, 15 F.3d at 1238 ("ICI was a private entity when it entered into its insurance contract with TETCO,

but '[w]hen financial difficulties threatened in 1985, the Irish government moved to preserve the company.' ") (quoting *Mobil*, 984 F.2d at 665); *compare Mobil* 984 F.2d at 665 ("At the time of underwriting, ICI was not owned by the Irish government. When financial difficulties threatened in 1985, the Irish government moved to preserve the company."). Thus, in both cases, ICI's acts occurred when ICI was a private entity, and in both cases, the Irish government subsequently took over ICI. Accordingly, the results in the Third and Fifth Circuits with respect to ICI are anomalous.

In the second example, the Airbus Defendants pointed out that within the Southern District of Texas, Airbus is an agency or instrumentality of a foreign state in Houston, *Kern v. Jeppesen Sanderson, Inc.*, No. H-93-3065, slip op. at 8 (S.D. Tex. June 13, 1994), but that in Galveston, Airbus is not an agency or instrumentality of a foreign state, Appendix E at E-7 to E-8. *See* Pet. at 24.

The *Kern* case was a consolidated action of four cases: *Kern v. Jeppeson Sanderson, Inc.*; *Driessen v. Airbus Industrie (GIE)*; *Duhig v. Jeppesen Sanderson, Inc.*; and *Nordmann v. Airbus Industrie*. Respondents suggest that *Kern* is distinguishable given that in *Kern*, the Airbus Defendants presented the district court judge with a different time frame for calculating their ownership interests. Br. in Opp. at 13. Although a different time frame was applicable to the consolidated cases in the *Kern* proceeding, as to three of the consolidated cases, this distinction is relevant, but as to the fourth, the *Nordmann* case, the distinction is irrelevant. As the briefing in the *Nordmann* case demonstrates, *Nordmann* presents the same legal issue as this case – whether the German interests owned through Deutsche Airbus GmbH could be included. To have held that Airbus was a foreign sovereign, the *Kern* court necessarily accepted the tiering of the German interests. *See* Airbus Defendants' Motion to Dismiss and, in the Alternative, Motion for More Definite Statement, filed in *Nordmann v. Airbus Industrie*, No. G-93-610, consolidated with *Kern*, No. H-93-3065, S.D. Tex., at 10-13, 12 n.5 (explaining that unlike the other cases consolidated into the *Kern* proceeding, the *Nordmann* case presented the same legal issue that was before the district

court in *Linton*). Accordingly *Kern* (at least as to *Nordmann*) is absolutely indistinguishable from this case, and the net result is that Airbus is a foreign sovereign in Houston but, 40 miles away in Galveston, in the same district, it is not.

IV. Final Resolution of Disputed Fact Assertions About the Foreign Ownership Interests of the Airbus Defendants Did Not Preclude the Fifth Circuit from Resolving the Issues Presented on Appeal, and They Do Not Preclude This Court from Determining Whether the Fifth Circuit Erroneously Refused to Exercise Jurisdiction.

The Respondents also suggest that this Court should refuse to grant the writ because the FSIA Order "never made a final factual resolution of the asserted ownership interests," and that this Court therefore "could not review the matter even if an exception to section 1447(d) applied." Br. in Opp. at 14. This Court's decision in *Mitchell v. Forsyth*, 472 U.S. 511, 527 (1985), refutes this argument and the Respondents' attempt to characterize this case as turning on its own facts. In *Mitchell*, this Court explained that a trial court's determination that a defendant is not entitled to immunity from suit which is based on an assumption that the facts asserted by the defendant are true, is a final, appealable decision under the collateral order doctrine: "In such a case, there will be nothing in the subsequent course of the proceedings in the district court that can alter the court's conclusion that the defendant is not immune." *Id.*

As in *Mitchell*, in this case, the district court accepted as true for the purposes of the FSIA Order the assertions made in an affidavit presented by the Airbus Defendants and ruled that, as a matter of law, the Airbus Defendants were not foreign sovereigns. Appendix E at E-4 n.3. On appeal from the FSIA Order, the sole issue is whether the district court properly interpreted the FSIA. Accordingly, unresolved factual disputes did not preclude the Fifth Circuit from resolving whether the district court erroneously interpreted the FSIA. Moreover, these factual disputes have no bearing on whether this Court can or should exercise its certiorari jurisdiction to address

whether the Fifth Circuit should have exercised its jurisdiction over the appeal.

V. The Fifth Circuit's Improper Application of Section 1447(d) to Bar Review of a Denial of a Claim of Immunity from Suit Under the FSIA Defeats the Policy of the FSIA.

The Respondents attempt to minimize the strong congressional policy behind the FSIA by pointing out that the FSIA contemplates that suit may be brought in either federal or state courts. Br. in Opp. at 15. Although plaintiffs are free to bring these claims in either forum, this argument ignores the clear congressional intent that foreign sovereigns be given the right to a federal forum should a plaintiff choose to bring suit in a state forum. *See* Pet. at 22-25. Because under the Fifth Circuit's decision determinations of FSIA status are only reviewable if the plaintiff chose a federal forum initially, the decision gives plaintiffs a litigation advantage by filing in state court and promotes forum shopping.

VI. The District Court's Underlying Denial of Immunity from Suit Under the FSIA Was Erroneous.

The Respondents attempt to characterize Petitioners' arguments that the FSIA Order was erroneous as "depend[ing] upon a convoluted three-tiered formula." Br. in Opp. at 2. The Fifth Circuit, although it found that it had no jurisdiction to consider the underlying FSIA issue, stated that "the Airbus Defendants have, at least facially, presented a strong factual and legal claim of immunity." Appendix A at A-12. The Fifth Circuit also expressly criticized the district court's holding and suggested that the Airbus Defendants' position that the FSIA permits both pooling and tiering was correct. *Id.* at A-12 to A-13 n.28. Respondents make no attempt to refute the Fifth Circuit's reasoning or to show how the FSIA places any restriction on the manner in which foreign state ownership must be held.

After Petitioners filed their petition for a writ of certiorari with this Court, the Fifth Circuit issued its opinion in *Mangattu v. M/V IBN HAYYAN*, 35 F.3d 205 (5th Cir. 1994). In *Mangattu*, the district court found that appellee, which was wholly owned by six

foreign sovereigns, was a foreign state under the FSIA. *Id.* at 206-07. The Fifth Circuit rejected appellants' argument in that case that the FSIA "requires that 51% or more of appellee's stock be owned by a single foreign state, and that several foreign states cannot pool their ownership interests," *id.* at 207, and held that pooling is permitted by the FSIA, *id.* at 207-08.

CONCLUSION

For these reasons, as well as the reasons set forth in the petition for writ of certiorari, Petitioners respectfully request that the Court grant the petition for writ of certiorari and that the Court grant all relief requested in the petition for writ of certiorari.

Respectfully Submitted,

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